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No. 84-398

In the Supreme Court of the United States

October Term, 1984

MARY ELLEN KIMBLE,
Petitioner,

vs.

THE WORTH COUNTY R-III BOARD OF EDUCATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BRIEF FOR THE RESPONDENT

NORMAN HUMPHREY JR.
(Counsel of Record)
HUMPHREY & FARRINGTON, P.C.
123 W. Kansas
Independence, Missouri 64050
(816) 836-5050
Attorneys for The Worth County R-III Board of Education

Of Counsel:

JOHN C. ANDREWS
P. O. Box D
Grant City, Missouri 64456
(816) 564-3334

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED

1. Should this Court grant jurisdiction of Petitioner's Petition for Certiorari under the facts and circumstances as set out in Petitioner's Brief?

2. If this Court should grant jurisdiction in this matter, is the Missouri statute in question unconstitutionally vague?

3. If this Court should grant jurisdiction in this matter, did the court below adequately determine that there was a nexus between the teacher's misconduct as determined by the Board of Education and her fitness to teach?

4. If this Court should grant jurisdiction in this matter, was the termination of the teacher in retaliation for her exercise of freedom of speech, thereby violating the First and Fourteenth Amendments?

5. If this Court should grant jurisdiction in this matter, was the adverse decision below violative of the Petitioner's due process rights because certain items which Petitioner claimed were important evidence were not considered by the lower court?

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The citations to the opinions below are given in the Petitioner's Brief (p. 1). In addition, the text of the opinions below are set out in the Appendix heretofore filed by Petitioner. Rather than filing an additional Appendix, which would seem to be an unduly burdensome procedure, Respondent would adopt Petitioner's Appendix and merely ask the Court to consider pages 169 and 170 of the transcript of the hearing before the School Board in addition to the portions of that transcript set out in Petitioner's Appendix A-73 *et seq.* The portion that the Respondent wishes the Court to consider will be set out in the appropriate Argument section in this Brief.

JURISDICTION

Petitioner has invoked jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3)(1976). It is Respondent's position that this Court should not accept jurisdiction under said Section and under the Rules of this Court. 28 U.S.C.A., U. S. Sup. Ct. Rule 17.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the Constitutional provisions and statutes specified at page 3 of Petitioner's Brief, this case also involves 28 U.S.C.A., U. S. Sup. Ct. Rule 17.1, which reads as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) When a state court of last resort has decided a federal question in a way in conflict with

the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

STATEMENT OF CASE

Petitioner's statement of the case does set out generally the history of this matter from the School Board hearing through the Supreme Court of Missouri's refusal to transfer the cause from the Missouri Court of Appeals. However, as is often the situation in a matter of this nature, Petitioner falls into argumentative modes of statement at various stages. For instance, on page 6 of Petitioner's Brief, Petitioner indicates that "evidence" showed that certain statements were made by the Superintendent to Petitioner. Petitioner fails to point out that this evidence was that of her own testimony and that at least a portion of that evidence was refuted by the Superintendent in his testimony. On pages 7 and 8 of Petitioner's Brief, Petitioner indicates that the Statement of Charges filed against Petitioner is set forth. That is correct with the exception that a number of those charges were dismissed by stipulation of Petitioner's attorney and Board counsel prior to the hearing. Only the teapot incident in 1973-74, the gate receipts incident in 1976-77 and the incident involving the set of books in 1982 were involved in the hearing. On page 8 of Petitioner's Brief, Petitioner raises the totally unwarranted and argumentative statement that "circumstances therefore strongly indicate that Ms. Kimble was dismissed because of her constitutionally

protected speech, . . ." and then Petitioner goes on to state that her brief before the Missouri Court of Appeals brought out the argumentative position that the administrators that testified in the hearing had an axe to grind because of the Petitioner's activities with the local teacher's association.

At the bottom of page 9 of Petitioner's Brief, it is stated that a check which Petitioner deems to be important to the case disappeared while "in the possession of the Board". This is a misstatement of the facts and evidence of the matter by Petitioner and will be taken up by Respondent in Argument.

At page 10 of the Brief, Petitioner fails to point out that the affidavits signed by bank employees were filed with the Missouri Court of Appeals after that court received written briefs, heard oral argument on the case, and made its decision. These affidavits were filed in connection with a motion for rehearing.

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner's writ should be denied because the court below upheld the validity of the state statute in question. Certiorari should not be granted unless there is a not insubstantial claim that the federal law requires a different result than that reached by the state court. The Supreme Court will not review a federal question that is raised for the first time in seeking review of a completed state proceeding. A federal issue that is presented for the first time in a motion for new trial, appeal, or motion for rehearing is raised too late. The state court judgment below rests on adequate grounds.

ARGUMENT

I. SHOULD THIS COURT GRANT JURISDICTION OF PETITIONER'S PETITION FOR CERTIORARI UNDER THE FACTS AND CIRCUMSTANCES AS SET OUT IN PETITIONER'S BRIEF?

Petitioner would urge jurisdiction of this certiorari review by the Supreme Court pursuant to 28 U.S.C. § 1257 (3). However, Petitioner has misread that statute because subsection (2) of the same section provides for review by appeal where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision *is in favor of its validity.* That is exactly what happened in the case at hand as a review of the decision of the lower court will show. In other words, a portion of the teacher tenure statute of the State of Missouri, § 168.114 Mo. Ann. Stat., was determined to be valid and constitutional.

It, therefore, follows that 28 U.S.C. § 1257(3), pertaining to certiorari review, provides for review only if the state decision is against the validity of a state statute. See Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4012, pp. 602, 603.

The threshold procedural requirement for Supreme Court review is that the tendered federal questions have been presented to the state courts. Many decisions announce the rule that the Supreme Court will not consider questions that are raised for the first time in seeking review of completed state proceedings. This requirement is most immediately founded on the statutory provision for

review of federal matters that have been "drawn in question" or "specially set up or claimed". There is no difficulty in applying this principle so long as no effort has been made to present the issue to the state courts. See Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4022, p. 696 and 28 U.S.C. § 1257(3). *Cardinale v. State of Louisiana*, 394 U.S. 437, 438 (1969).

Again from Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4022, p. 701, we find:

> "Most and perhaps all of the cases that do not expressly invoke the test of the adequate state ground decisions have excused or penalized failures of presentation that would clearly be treated the same way under those tests. Ordinarily, the federal issue is presented too late if it is first raised in a motion for new trial, is raised for the first time on appeal, or is not presented with a clarity required by state appellate procedure or is not advanced until a petition for rehearing addressed to the decision of the highest appellate court. . . ."

Petitioner seeks to thrust upon this Court two arguments involving alleged federal questions which were not raised until Petitioner filed her alternative motion for rehearing or transfer in the appellate court below. Those questions are set out as numbers 3 and 4 on pages i and ii of Petitioner's Brief. The issues presented to the court below by Petitioner's Brief before that court are essentially set out in Petitioner's Questions For Review numbers 1 and 2 as set out on page i of Petitioner's Brief. The other arguments made by Petitioner for the lower court had to do with the weight of competent and substantial evidence produced at the School Board hearing and the ques-

tion of the applicability of laches. Neither of these arguments are raised in Petitioner's Brief before this Court and, of course, they should not be raised under the jurisdictional limits discussed above.

Petitioner tries to bring into the case her retaliation for exercise of freedom of speech argument through a quote from the Petitioner's Brief before the Missouri Court of Appeals on page 8 of Petitioner's Brief before this Court. That purely presumptive and assumptive quote is totally argumentative and self-serving since there was absolutely no evidence that any of the administrators involved in the hearing had an "axe to grind" because of Petitioner's activities with the teacher's association. That question came up under section III of the Points and Authorities in the brief before the lower court wherein Petitioner alleged that the decision to terminate her was not supported by competent and substantial evidence produced at the School Board hearing and there was no mention made whatsoever of any constitutionally protected speech or other federal question. Again, to bring that type of matter before the Court at this time is too little and too late.

There was not even a pretext of bringing Petitioner's fourth question presented for review before the lower court, that question being whether or not the lower court considered certain items of evidence, and its alleged violation of the teacher's substantive due process rights by failing to do so. That argument came up in Petitioner's motion for rehearing after the decision was rendered in the Missouri Court of Appeals and the affidavits of bank employees which commence on A-66 of the Appendix were first obtained by Petitioner at that time. Through the fault of Petitioner only, this argument was not presented to the Missouri Court of Appeals and denies jurisdiction of this Court accordingly.

II. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, IS THE MISSOURI STATUTE IN QUESTION UNCONSTITUTIONALLY VAGUE?

If this Court should decide to grant jurisdiction to this writ notwithstanding Petitioner's failure to comply with the statutes and rules pertaining to the requirement of finding of invalidity of a state statute and timeliness of presentation of a federal question, the only possible issue before the Court would be that first raised by the Petitioner-Teacher before the Board of Education and maintained through the circuit court hearing and the court of appeals hearing. That argument is set out in Petitioner's Questions Presented For Review numbers 1 and 2 and is argued as numbers I and II. However, there is one important exception which Respondent will take up shortly.

Petitioner would have this Court grant review on the basis that the Missouri statute in question, § 168.114.1(2) Mo. Ann. Stat., is constitutionally unfirm because of vagueness and that the decision below is in conflict with prior decisions of this Court and in conflict with a prior decision of a federal court of appeals. Petitioner's position is wrong and perhaps misleading in at least one respect. The only case of which Respondent has knowledge that would support Petitioner's position is a district court case arising out of Oregon in 1973, *Burton v. Cascade School District Union High School 5, et al.*, 353 F.Supp. 254, *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). It is true that the district court in that case reached a bare conclusion that a statute allowing for dismissal of teachers on grounds of "immorality" was unconstitutionally vague, citing the language set out on page 17 of Petitioner's Brief.

The *Burton* decision, which appears to Respondent to be the only decision declaring a teacher dismissal for immorality statute unconstitutionally vague, resulted in an award of damages and attorney's fees to the teacher. The teacher had asked for reinstatement to her former position and the court denied that request. The teacher appealed to the Ninth Circuit Court on that question and the School Board filed a cross appeal. Apparently the board appeal was dismissed for failure to file its brief and the Ninth Circuit, reasoning that the non-tenured teacher had no property interest in continuance of employment, affirmed the lower court decision. When we read Petitioner's argument on page 18 of her Brief, she would have us believe that the Ninth Circuit case conflicts with the lower court decision in the instant case. That is a completely wrong and misleading statement. The Ninth Circuit did not act upon the question of constitutionality of the statute but merely took up the question of reinstatement, therefore there is no basis for stating that the lower court decision in this case is in conflict with a decision of a court of appeals.

The whole range of legal issues involved in this case is discussed in a very exhaustive and learned monograph prepared by the National Organization of Legal Problems of Education.[1]

Even in the *Burton* case with its flat holding against the term "immorality", the district court was troubled and mentioned in footnote at page 255 the following:

> "1. ORS 342.530(1)(b) also presents serious constitutional problems because it does not require a nexus between conduct and teaching performance. *Mindel v. United States Civil Service Commission,* 312 F.Supp. 485 (N.D. Cal. 1970)."

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1. Delon, F., "Legal Issues In The Dismissal Of Teachers For Personal Conduct", 1982.

It seems almost an afterthought that the district court stated that lack of showing of a nexus between teacher conduct and the teacher's ability or performance was suspect. The court's use of the footnote indicates that in 1970 it was considering the same basis which all other courts known to Respondent now consider in this type of case, *i.e.* "nexus".

Other cases cited by Petitioner in her argument really do not lend weight to her position. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), we see this Court concerned with the constitutionality of anti-noise and anti-picketing ordinances as they affected demonstrations surrounding a school building. As a matter of fact, the anti-noise ordinance was upheld and the anti-picketing ordinance was overturned under the equal protection theory. Appellant had claimed that both ordinances were, on their face, vague and overbroad, and, therefore, unconstitutional.

The *Grayned* court said at page 109:

> "Although the question is close, we conclude that the anti-noise ordinance is not impermissibly vague. The court below rejected Appellant's arguments 'that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed.' 46 Ill.2d at 494, 263 N.E.2d, at 867. Although it referred to other, similar statutes it had recently construed and upheld, the court below did not elaborate on the meaning of the anti-noise ordinance. In this situation, as Justice Frankfurter put it, we must 'extrapolate its allowable meaning.' Here, we are 'relegated . . . to the words of the ordinance itself,' to the interpretations the court below has given to analogous statutes, and, perhaps, to some degree, to the intepretation of the statute given by those charged with enforcing it. 'Ex-

trapolation', of course, is a delicate task, for it is not within our power to construe and narrow state laws."

The *Grayned* court went on at page 111:

". . . Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.' However, in *Chicago v. Meyer,* 44 Ill.2d, 4, 253 N.E.2d 400, 402 (1969), and *Chicago v. Gregory,* 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111, 22 L.Ed.2d 134, 89 S. Ct. 946 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, inter alia, a 'diversion tending to disturb the peace' and held that it permitted conviction only where there was '*imminent* threat of violence.'" (Emphasis supplied by Court.)

This Court went on to say that the Supreme Court of Illinois would probably interpret the Rockford ordinance to prohibit only actual or imminent interference with the peace or good order of the school. (*Id.*, pp. 111, 112.)

What the *Grayned* court was, in fact, saying was that the reviewing court must look to interpretations applied to statutes by the state courts since not every possible safeguard could be included in the statute itself.

The *Keyishian v. Board of Regents of University of State of New York,* 385 U.S. 589 (1967) case cited by Petitioner at page 14 of her Brief seems to be an overbreadth case and the application of the statute in that case had serious First Amendment freedom implications. The case, while having some general applicability to the matter at hand, is really not specifically in point.

Petitioner then proceeds to cite several cases on pages 15 and 16 of her Brief which are prior restraint cases. The *Holmby Productions, Inc. v. Vaughan,* 350 U.S. 870

(1955) case, *Superior Films, Inc. v. Department of Education of Ohio,* 346 U.S. 587 (1954) case, and *Commercial Pictures Corp. v. Board of Regents of University of State of New York,* 113 N.E.2d 502 (1953) case, are all censorship or board of review cases for moving pictures. The film censorship cases are not relevant or in point and do not require analysis in this Brief.

In the *Morgan v. City of Detroit,* 389 F.Supp. 922 (E.D. Mich. 1975) case cited on page 20 of Petitioner's Brief, the "lewd and immoral acts" which that court found to be deficient were acts of sexual immorality. The court found that no standards were offered as to what type of sexual conduct would be moral and which type would be immoral. Similarly, in the *Corporation of Haverford College v. Reeher,* 329 F.Supp. 1196 (E.D. Pa. 1971) case on page 20 of Petitioner's Brief, the district court in Pennsylvania determined that students should not have to be put to the test of divining which misdemeanors would involve "moral turpitude" and which would not.

On pages 21 and 22 of Petitioner's Brief, she throws in three final cases which purportedly would support her position that the Missouri statute is unconstitutional for vagueness. The case of *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), involved the troublesome area of vagrancy statutes. The District of Columbia ordinance in question had several sections, the one applicable here being apparently as follows: "3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

The *Ricks* court said at page 1107:

> "Not only does the phrase under scrutiny fail to chart for the individual citizen the course that is proscribed, but it also fails to mark out reasonably dis-

tinct boundaries for the judges, juries, and police officers who are required to administer the law. . . ."

In Missouri, the various boards of education, the reviewing courts, and the appellate courts are required to apply the limiting factor of "unfitness to teach", as we shall see in the next part of this argument. A-11.

The case of *Gregory v. Gaffney,* 322 F.Supp. 238 (W.D. N.C. 1970), and the case of *Oestreich v. Hale,* 321 F.Supp. 445 (E.D. Wis. 1970), are both prior restraint cases that were found to be vague and overbroad.

The case which is of seminal importance in this area is *Morrison v. State Board of Education,* 461 P.2d 375, a case decided in 1969 by the Supreme Court of California, en banc. At page 386, we find the following:

"We, therefore, conclude that the Board of Education cannot abstractly characterize the conduct in this case as 'immoral', 'unprofessional' or 'involving moral turpitude' within the meaning of § 13202 of the Education Code unless that conduct indicates that the petitioner is *unfit to teach.* In determining whether the teacher's conduct thus indicates unfitness to teach the Board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to [387] the

extent that they assist the Board in determining a teacher's fitness to teach, i.e. in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the Board's standards." (Emphasis supplied.)

The petitioner in that case urged that the California statute under which he was charged was unconstitutional because the terms thereof, and particularly the term "immoral", were so vague as to constitute a denial of due process. The *Morrison* court recognized that it had itself in the past determined that the term "immoral" might well be unconstitutionally vague, but it also stated that such vagueness could be resolved by more precise judicial construction and application of the statute in conformity with the legislative objectives. (*Id.* at p. 389.)

The court stated at page 389:

". . . As we have explained above, the prohibitions against immoral and unprofessional conduct and conduct involving moral turpitude by a teacher constitutes a general ban on conduct which would indicate his unfitness to teach. This construction gives § 13202 the required specificity. Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach. Teachers are further protected by the fact that they cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagree. . . ."

The federal district court for the Western District of Missouri in *Thompson v. Southwest School District,* 483 F.Supp. 1170, applied the very learned and extensive reasoning of the *Morrison* case, *supra,* to the Missouri statute when that statute was challenged by a teacher after being

suspended with pay because of the charge of immorality being brought against her by the school board. The district court considered the vagueness of the Missouri tenure statute specifically with regard to the term "immoral conduct" and cited the *Grayned* case, *supra*, 408 U.S. at 108-109, as holding:

> "Vague laws are offensive to notions of due process for a number of reasons. First, our judicial system has always insisted that laws give persons of ordinary intelligence an opportunity to know what conduct is prohibited so that they will have an opportunity to avoid that type of conduct. Secondly, if arbitrary and discriminatory enforcement is to be avoided, laws must provide explicit standards for those who apply them." (*Id.*, p. 1178.)

The court went on to say at page 1178:

> "Admittedly, not every statute which a reviewing court believes could have been drafted with greater precision is unconstitutionally vague. Because the Court is dealing with words, mathematical certainty can never be demanded nor expected." [Citing *Grayned, supra*, 408 U.S. at 110-111.] "However, legislation, particularly legislation imposing penalties, must fairly apprise those who are subject to its restrictions as to the proscribed conduct with a reasonable degree of certainty. *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979). Thus, the standard test for determining whether the terms of a statute are sufficiently precise to comply with due process concepts is whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." [Again, citing *Grayned, supra.*]

The court stated that the unconstitutionally vague test is more stringently applied in criminal penalties or where First Amendment freedoms may be violated, holding that in those areas strict standards of definiteness have been imposed. (*Id.*, p. 1179.) The court found that civil as well as criminal statutes must be sufficiently clear to give fair warning and provide a standard against which conduct can be uniformly judged, particularly where penal civil statutes are to be construed. The court said that because of the penal nature of the Missouri statute and the property interest that a tenured teacher has under the indefinite contract provisions of the statute, it would set a standard for determining the unconstitutional vagueness of the statute in question which would be governed by tests set forth in criminal and First Amendment areas as opposed to less stringent tests applied to regulatory statute governing economic or commercial activities. (*Id.*, p. 1179.)

The court admitted that it had serious doubts as to the baldface term "immoral conduct" and cited the *Burton v. Cascade School District* case, *supra*.

Judge Clark then stated:

> "However, even for purposes of evaluating whether a sufficiently serious question going to the merits exists, the court hesitates to suggest the possible unconstitutionality of the state statute. It is well established that constitutional principles dictate that courts should refrain from passing on constitutional questions if there are alternative grounds such as statutory construction upon which the case might be decided.' (*Id.* at pages 1179, 1180.)

Then, in the heart of the decision, the court stated:

> "The court believes that the statute in question is capable of being given a more precise judicial con-

> struction so as to avoid the vagueness issue. If the term 'immoral conduct' is considered not in the abstract but in the overall context of § 168.114, Mo. Rev. Stat., it seems clear that the legislature intended to allow dismissal only in instances where immoral conduct adversely affected the teacher's performance." *Supra,* at 1180.

After relating other portions of § 168.114 Mo. Rev. Stat. which specifically allowed dismissing teachers for conduct unfitting them to instruct or associate with children or proscribed activities in the line of duty, the court determined that § 168.114.1 must be read in conjunction with § 168.114.2. The latter subsection sets out guidelines for evidence to be used in determining professional competency or efficiency. The court found that subsection clearly indicates that the language Petitioner complains of relates to grounds for dismissal wherein a teacher's competency has been affected.

At page 1180, the court found:

> "Thus, the court believes that the term 'immoral conduct' was intended in this context to relate to conduct which would render a teacher unfit for the performance of his duties. A number of other courts when faced with similar statutes have reached identical conclusions. . . ."

The court then cited the *Morrison* case, *supra,* and *Weissman v. Board of Education of Jefferson County School District, No. R-1,* 547 P.2d 1267 (1976), a case involving dismissal of a tenured teacher on the grounds of "immorality". See also *Reinhardt v. Board of Education,* 311 N.E.2d 710 (1974); *Gaylord v. Tacoma School District No. 10,* 559 P.2d 1340 (1977).

Then the court cited a litany of Missouri state cases which provided support for its holding.

The *Thompson* case, *supra,* was cited with approval by the Missouri Supreme Court in *Ross v. Robb,* 662 S.W.2d 257 (Mo. banc 1983), which was in turn cited by the lower court in this case. See Petitioner's Appendix A-11. The *Ross* court concluded "that immoral conduct relates to conduct rendering a teacher unfit for the performance of his duties" as taught by *Thompson, supra.*

So, the Missouri Court of Appeals, in the decision which Petitioner seeks review by this Court, followed the overwhelming majority of decisions in this country. Only the *Burton* case, *supra,* would appear to be contra. That fact is not sufficient to raise the jurisdiction necessary to grant certiorari.

III. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, DID THE COURT BELOW ADEQUATELY DETERMINE THAT THERE WAS A NEXUS BETWEEN THE TEACHER'S MISCONDUCT AS DETERMINED BY THE BOARD OF EDUCATION AND HER FITNESS TO TEACH?

We have heretofore discussed the requirement of nexus between proscribed acts of the teacher and the teaching performance itself. We have pointed out that the Missouri courts, through *Thompson, supra,* and *Ross, supra,* have followed this principle in Missouri. This principle was further followed by the School Board in the case at hand wherein it was found in paragraph 18 of the Findings:

> "[t]hat the continued employment of Mary Ellen Kimble creates additional administrative and super-

visory burdens as well as distrust among the staff and faculty and has an adverse and detrimental effect upon the students, faculty and the educational process of the Worth County R-III School District." See A-56.

The Missouri Court of Appeals found that, in the face of Petitioner's argument that her actions did not render her unfit to teach:

> "This argument is soundly refuted by competent and substantial evidence permeating the whole record supporting both the conduct alleged and the fact that such rendered her unfit to teach, thus meeting the test of 'immoral conduct' set forth in *Ross v. Robb, supra.* The taking of property belonging to another, without consent, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of an impressionable age. It is imminently proper to note that Kimble, in addition to her duties as librarian, taught 'library' and 'reference skills' at the elementary level on a regular basis, and on an incidental basis at the high school level." See A-12.

Golden v. Board of Education of the County of Harrison, 285 S.E.2d 665 (W.Va. 1981).

There is no doubt but that the nexus question was considered by both the Board of Education and the Missouri Court of Appeals and Petitioner's complaint that there was failure to consider the effect of the alleged actions is not appropriate.

Petitioner would urge upon the Court that statements of teachers and election to a post in the community teacher's

association would refute any nexus between conduct and fitness to teach. However, it should be remembered that the teachers did not have the duty of evaluating Petitioner and when the various administrators testified, the nexus was quite well established. Petitioner complains of and fails to establish some prejudice that the administrators of the School District had because of her community teacher's association activities. There was no evidence of this conflict whatsoever with the prior superintendents and the only evidence at the School Board hearing was the unsubstantiated testimony of Petitioner and the Superintendent of Schools, who recommended her termination.

Finally, Petitioner would seem to say that she would have to be convicted of a crime in order to be terminated for immoral activities. She cites the *Hoagland v. Mt. Vernon School District* case, 623 P.2d 1156 (1981), for that apparent position. It seems to Respondent that the severity of the action may not be extremely important, particularly if no nexus is established. However, in this case a nexus was established and as the Missouri Court of Appeals found, there was a pattern of continuing behavior exhibited by Petitioner. See A-14.

IV. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, WAS THE TERMINATION OF THE TEACHER IN RETALIATION FOR HER EXERCISE OF FREEDOM OF SPEECH, THEREBY VIOLATING THE FIRST AND FOURTEENTH AMENDMENTS?

Respondent has heretofore argued that this Court should not consider Petitioner's Argument III relating to alleged retaliation for exercise of freedom of speech rights, but out of an abundance of caution, Respondent will make some remarks relating to the argument presented by Petitioner in this area.

Because all testimonial and documentary evidence at the hearing before the Board of Education indicates that Petitioner was terminated because of several acts of taking things that did not belong to her and without the consent of the owner and lying about the circumstances, or at least not recalling the circumstances in the face of credible testimony by administrators and teachers, Petitioner would seek to require the Court to draw an inference that the reasons given for her termination were a pretext generated by the School Board to conceal retaliation for an exercise of a First Amendment right.

Petitioner offered no probative evidence to support this inference and, indeed, the argument was not presented to the Board of Education or the Missouri Court of Appeals.

Petitioner would offer her evaluation reports as a librarian to justify retaining her position in the teacher corps of the School District in the face of overwhelming substantive evidence of immoral conduct as set out in the charges and as determined by the School Board in its Findings of Fact. See A-48, *et seq.* No doubt a person of extremely unsavory character could have a good or even excellent evaluation as a teacher but if the immoral actions of that teacher are such as to render the teacher unfit to teach or to be associated with young people of an impressionable age, and if the presence of the teacher in the school environment is disruptive to the educational process, then there is little, if any, choice on the part of the School Board. Indeed, to retain such a teacher would be unthinkable.

Two of the charges of immoral conduct considered by the Board of Education occurred at a time preceding the alleged conversation between the Petitioner and the

School Board President. Both the Board and the Missouri Court of Appeals found the evidence of such incident to be against the position of the teacher. Thus, the "but for" test in *Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), was met.

The other cases cited by Petitioner on pages 34 through 39 of her Brief really do not add anything to the controversy at hand. Certainly, Respondent would agree with Petitioner that those cases stand for the proposition that the reasons given for dismissal were so trivial in nature that when compared to the constitutional rights of the teacher in each case, the charges were a mere pretext. Those cases primarily record a long history of constitutionally protected activities on the part of the teacher and extremely trivial charges in most cases. At any rate, the charges did not come close to the subject case where the teacher was charged with taking items which did not belong to her and lying about the circumstances.

V. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, WAS THE ADVERSE DECISION BELOW VIOLATIVE OF THE PETITIONER'S DUE PROCESS RIGHTS BECAUSE CERTAIN ITEMS WHICH PETITIONER CLAIMED WERE IMPORTANT EVIDENCE WERE NOT CONSIDERED BY THE LOWER COURT?

Petitioner claims that her due process rights were violated because an item of evidence was not considered by the Board of Education or by the Missouri Court of Appeals below. As pointed out in Argument I, Petitioner did not raise this alleged defect in her appeal from the Board decision but raised it for the first time in Petitioner's motion for rehearing which Respondent feels is

too late to invoke the jurisdiction of this Court. Again, out of an abundance of caution, Respondent will respond to Petitioner's position and say that Petitioner's complaint is not well taken. The School Board found that the Petitioner's exhibits were inconclusive for Petitioner because the bank statement contained missing checks. An earlier superintendent had received a $20.00 check from Petitioner as reimbursement to the School District for a $20.00 cash item that Petitioner had allegedly taken from gate receipts at a basketball game. See A-52.

Petitioner did not complain of this finding in her argument in the Missouri Court of Appeals and did not raise that position in her brief before that court. As stated before, this position was raised for the first time on the motion for rehearing when Petitioner sought to have several affidavits presented to the Missouri Court of Appeals from bank employees.

When we review the transcript of the hearing before the Board of Education, this matter becomes more clearly in focus. At page 169 of that transcript, we have the following:

> "Q —Now at my request, have you obtained all of your checks for December, 1976, and January, 1977?
>
> "A —Yes.
>
> "Teacher's Exhibits L through O were marked by the reporter for identification.
>
> "Q (By Mr. Drake) —Mary Ellen, these have been marked Teacher's Exhibits L, M, N and O. 'L' and 'M' is the bank account of your husband at Mount Ayr, is that right?
>
> "A —Right.

"Q —And 'N' and 'O' is your bank account at Grant City?

"A —Yes, but those are both joint accounts.

"Q —They are both joint accounts, and they were both in 1976 and 1977, is that right?

"A —Right, uh-huh.

"Q —And do you and your husband have any other bank accounts at all?

"A —No.

"(By Mr. Drake) —I offer Teacher's Exhibits 'L', 'M', 'N' and 'O' in evidence.

"(By Mr. Andrews) —What are those checks or what months?

"(By Mr. Drake) —Checks for December and January of 1976 and 1977.

"(By Mr. Andrews) —I have no objection.

"Q (By Mr. Drake) —Now, without going through each one of those checks and every one of those bank statements, we have just put them in evidence so the Board can review them if they wish. Did you find any $20.00 checks to the school?

"A —To the school, no."

Petitioner, through her attorney, offered the exhibits to the Board of Education and the same were received by the Board in a bulk fashion. After those exhibits were reviewed by the Board, it seems that one or more of the checks indicated on the bank statements were missing. Based upon this, the Board made its finding as stated above. Petitioner would now have the blame for the missing check or checks placed squarely on the shoul-

ders of the Board of Education and Respondent believes that this would not be appropriate action.

The cases cited by Petitioner on pages 43 through 45 of her Brief are not really in point since they go to the premise that an accused has the right to have critical evidence admitted and not excluded, that all relevant and admissible evidence be permitted to be introduced and presented by the accused and this does not fit the case at hand. Petitioner had the opportunity to present all relevant and competent evidence and apparently did so. The Board of Education merely considered the evidence presented and acted in a reasonable, justified manner.

It is clear to see that Petitioner has not been denied any fundamental right to due process and that there is no paramount constitutional significance presented in her argument.

CONCLUSION

For the above and foregoing reasons, this Court should overrule and deny the writ of certiorari to the Missouri Court of Appeals, Western District, and make such other orders as to the Court shall seem appropriate.

Respectfully submitted,

HUMPHREY & FARRINGTON, P.C.
By NORMAN HUMPHREY JR.
123 W. Kansas
Independence, MO 64050
(816) 836-5050
Counsel for Respondent